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IN THE

Supreme Court of the United States

October Term, 1996

MICHIGAN DOCUMENT SERVICES, INC., AND JAMES M. SMITH,

Petitioners,

VS.

PRINCETON UNIVERSITY PRESS, MACMILLAN, INC., AND ST. MARTIN'S PRESS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners have asked this Court to determine whether fair use rights are lost when users avail themselves of the ministerial services of third parties. This fundamental question arises in a case where professors requested a copyshop to make "multiple copies for classroom use" of reading handouts for their students, where the Copyright Act expressly identifies the making of "multiple copies for classroom use" of materials as typical of fair use, and where an *en banc* majority of the Sixth Circuit found the infringing conduct to be the making of "multiple copies for classroom use."

Never once do Respondents mention "multiple copies for classroom use." To avoid this language is to concede its importance.

Rather than presenting any reasoned basis to deny review, Respondents prove the broad consequences of the *en banc* decision and the need for this Court's guidance. Respondents offer no limiting principles to their view of the breadth of their copyrights; fair use exists, if at all, only in those rare instances where copyright owners have no inclination to charge for a use.

Respondents' view depends upon two faulty assertions. The first is that MDS "competes" with them. The second is that their right to charge for the copying of excerpts flows from their success in compelling others to pay for copying such excerpts. Without those linchpins, Respondents' entire framework collapses.

Photocopying Services Are Not "Publishing"

Publishers select works for publication. They choose authors, edit the works, and specify format. They

arrange for printing, distribution, and advertising of the completed works. They decide whether a book will be published, how long it will be in print, and the target audience. They set the publication schedule and the suggested retail and wholesale prices for the published works. *See, e.g., First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989), *cert. denied,* 493 U.S. 1075 (1990).

MDS does none of these. The professors determine what is to be printed, the college schedule determines when it should be printed, and the number of students enrolled in the class determines how many copies are printed. The course handouts are not sold to the public, Pet. at 110a, and are not marketed to other professors or universities.[1] There is no "market" for these assigned readings, unless one is prepared to argue that any recipient of photocopying services is the "market" for the materials copied at his request or on his behalf. A failure to distinguish between the very different businesses of Respondents and MDS prevents a court from seeing MDS as a part of the use of the excerpts by the students and professors.

Respondents previously have admitted that they do not provide coursepack services to students and professors. JA 3701. Why, then, do they assert that MDS is a "direct competitor?" Opp. at 1. *First,* when a court confuses

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[1]In an attempt to make the professors' course handouts look like a "work" that the publishers have the right to control, Respondents call the handouts "books" and "anthologies." There is nothing in copyright law, common sense, or the evidentiary record to support the argument that glue and a cover page transform the semesters' readings, chosen solely for pedagogical reasons, into a work of original authorship.

photocopying services with the business of publishing, Respondents win. *Second,* once money changes hands, Respondents raise the fair use hobgoblin of "commerciality;" courts mistakenly view the for-profit service to the user as a for-profit exploitation of the work and tilt the entire analysis against fair use. *Third,* Respondents hope that their complete failure to show harm to the lawful markets for the works will be eclipsed by their "lost permission fees" theory of market harm, where "lost" means that they did not get paid what they have been able to extract from other copyshops and universities.

In short, Respondents label MDS a competitor because they otherwise would have to contend with the plain truth — Congress removed the making of "multiple copies for classroom use" from the exclusive control of copyright owners.

Some Excerpting Must Be Fair Use

Petitioners offer an analytical framework under which both users and owners have rights under the Copyright Act. This framework acknowledges that some copying for educational use will be fair while other copying for educational use will be an infringement. This balance of rights is dictated by the plain language of the Copyright Act, this Court's copyright jurisprudence, and copyright policy embodied in the Constitution. It requires a rule of reason analysis and proceeds on a case-by-case basis. *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 577 (1994); *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 448 (1984).

Petitioner's market harm analysis is based upon the rights granted to owners by Congress. For example, if a

professor requests copying of an excerpt as a substitute for assigning the purchase of the work, that would be evidence of market harm under 17 U.S.C. § 106(1). If a professor's use of an excerpt harmed the copyright owner's ability to enter into a contract for the serialization of the book in a magazine, that would be evidence of market harm under 17 U.S.C. § 106(2).[2]

Respondents, in contrast, offer no statutory framework for analyzing fair use. They offer a vision of fair use that Congress *could* have enacted *but did not* — the "classroom guidelines," a report from an *ad hoc* group of industry representatives filed as a part of the legislative history of the Copyright Act. That report was not intended as a limitation on fair use, JA at 1077-81, and the report so states. Pet. at 20a. That report is a publishers' wish list of restrictions, such as limiting fair use to a certain number of words, prohibiting a teacher from planning in advance to copy materials, prohibiting a teacher's use of materials more than once, and prohibiting the use of excerpts from more than one source. Opp. at 22-23.

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[2]While published anthologies include passages from other works, it does not logically follow that a professor's selection of excerpts for use as course handouts harms anthologies that might have included those excerpts. Otherwise, no work could ever be excerpted for classroom use without "harming" an "excerpt market." In light of the professors' declarations that they use excerpts where textbooks alone do not adequately serve their teaching purposes, it is not surprising that Respondents have been unable to produce evidence that coursepacks impair their ability to produce an anthology or license the use of an excerpt in an anthology.

Yet in practice, Respondents deny that they must permit even this extraordinarily limited use. They contend that they may grant or deny permission on any basis whatsoever, that they may use their own company policies and not § 107 as the source of law, that they may control uses even within the confines of the *ad hoc* report, and that they may control photocopying of a book in the public domain if they originally had published it. *See* JA 1355-70, 1416-27. Given these views, it is rather remarkable that Respondents characterize Petitioner James Smith as a "maverick" — Mr. Smith's staunch adherence to the plain language of the Copyright Act has enjoyed the support of four of the seven opinions issued to date in this case.

Respondents' disdain for fair use is exemplified by their reference to MDS's photocopying of the six excerpts at issue as the "tip of the iceberg." Opp. at 6. When a use is fair, it is outside the rights of the copyright owner. There is no legal basis for a complaint about even an "iceberg" of fair use. Like free speech, fair use does not become illegal simply because it is exercised in volume.

No Licensing of Excerpts *Qua* Excerpts

Contrary to Respondents' contention, this Court never has recognized the legitimacy of the licensing fees demanded by Respondents. *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985), does not stand for the proposition that licensing fees may be charged for the use of excerpts *qua* excerpts. Opp. at 11. In that case, the copyright owner had licensed the unpublished work for use in a true *derivative work* — a serialization. Unlike "excerpts," serializations are recognized as derivative works, 17 U.S.C. § 101, and the right to prepare a derivative work is expressly granted to the

copyright owner. 17 U.S.C. § 106(2). When The Nation obtained a stolen copy of the unpublished manuscript and published a qualitatively significant portion, the licensee of the serialization right canceled the contract for the derivative work. Thus, the fees at issue in *Harper & Row* did not derive from the use of the published portion as an excerpt, but from the licensing of the serialization right. Similarly, the licensing fees found significant in *Stewart v. Abend,* 495 U.S. 207 (1990), were those lost as a result of the release of an unauthorized *derivative work*, a film adaptation of a book.

Indeed, there is not one case on which Respondents rely (other than the discredited *Kinko's* opinion) in which a court held that a copyright owner could charge for the excerpting or use of a work merely because the owner set up a system to charge for the use. The uses complained of in Respondents' cases involved actual harm, or allegations of harm, to the market for the original work or for derivatives. Without evidence of market substitution, there can be no relevant market harm and no cognizab'e injury. *Campbell,* 510 U.S. at 591.[3] Indeed, *amici* music publishers in *Campbell* claimed to be entitled to millions of dollars in revenue from an existing licensing system for music parody, yet this Court still found that parody was outside the control of the copyright owner.

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[3]Nevertheless, despite the evidentiary showing contemplated by 17 U.S.C. § 107(4) and the burden placed on the movant under Fed. R. Civ. P. 56, the *en banc* majority affirmed an award of summary judgment to Respondents. Given Respondents' lack of evidence of harm to a relevant market and Petitioner's affirmative showing of *no* market harm, the award of summary judgment could have been based only on a presumption of market harm expressly rejected in *Campbell*.

If permitted to stand, the 8-5 *en banc* decision authorizes a self-perpetuating regime exclusively controlled by publishers under which professors are forced to assign for purchase publishers' books that may not suit their teaching purposes, pay the fees demanded for use of any excerpt, or forego providing their students with "multiple copies for classroom use" of the desired teaching materials. This is exactly what is taking place, and professors have declared it a disaster for education. *See* Amici Brief of Concerned Professors of Law; JA 1457-1859.

CONCLUSION

If fair users lose their rights when they seek the assistance of services needed to effectuate those rights, and if the scope of fair use is determined by *ad hoc* reports and not by what Congress enacts, the copyright law has undergone a radical change without any amendment to the Copyright Act or pronouncements from this Court. The educational fair use rights reserved by Congress should not be so readily discarded.

The petition for certiorari should be granted.

Respectfully submitted,

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